IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 211 of 1982

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes : YES

2. To be referred to the Reporter or not? No :

3. Whether Their Lordships wish to see the fair copy of the judgement? No : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No : NO

5. Whether it is to be circulated to the Civil Judge? No :

NAGAR PANCHAYAT

Versus

SHANTILAL N JANI

Appearance:

MR RN SHAH for Petitioner

MR SK JHAVERI for Respondent No. 1

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 24/12/1999

ORAL JUDGEMENT

This Second Appeal under Section 100 of the Code of Civil Procedure, has been filed against the judgment and decree dated 30.1.1982 recorded by the learned

District Judge, Banaskantha, at Palanpur in Regular Civil Appeal No.11 of 1979 dismissing the appeal of the present appellant against the judgment and decree of the learned Civil Judge (JD) in Radhanpur dated 31.1.1979 in Regular Civil Suit No.92 of 1976 decreeing the suit of the respondent in terms of the relief prayed in the plaint.

2. On perusal of the judgment of the learned District Judge, it is clear that the present respondent is the owner of a moveable property situated at Kadia-vas at Radhanpur at Banaskantha District. The property is bearing City Survey No.61. This residential house belongs to the respondent and there is no dispute about the same. On the northern side of this property, there is an open land of the respondent and on the eastern side of the open land, the respondent has constructed a wall in 1964 after obtaining permission from the appellant-Nagar Panchayat. That on the northern side of the said open land, there is a room and shed of the ownership of the respondent which bears chalta No.230 and the above said room and the shed are the joint ownership of the respondent and his brother.

3. A city survey was conducted and during the course of the enquiry by the City Survey Officer, in enquiry No.6/74-75, the City Survey Officer declared that the respondent is not the owner of the said open land. The respondent preferred appeal before the Deputy Collector in 1975. It seems that the Deputy Collector found that the respondent was the owner of the said land. Therefore, to that extent, the appeal was allowed. However, the Deputy Collector further held that the said open land is subject to the use as right of way to other persons residing in the neighbourhood and no person should be entitled to build anything thereon and the neighbouring persons have got right of passage on the said land.

4. Feeling aggrieved by the said order of the Deputy Collector, the respondent preferred appeal before the Collector which was rejected.

5. The respondent carried the matter to the Revenue Tribunal and the Revenue Tribunal set aside the order of the Collector as well as of the Deputy Collector and remanded the matter.

6. The City Survey Officer decided the matter in the same manner. Then the matter was carried to the Dy.Collector and the Dy.Collector found that subject to the right of way to other persons, the respondent was

entitled to make use of the said land but the ownership right was not granted to the respondent. The matter was carried in appeal before the Collector as well as before the Revenue Tribunal and ultimately, the appeal was withdrawn from the Revenue Tribunal and thereafter, the suit was filed by the respondent before the Civil Court.

7. Therefore, the respondent contended that he was the owner of the said open land and hence a declaration may be given to that effect. A suit was therefore, filed by the respondent for declaration and injunction.

8. The appellant resisted the suit and contended that the respondent was not the owner of the said open land. Necessary issues were framed and after considering the evidence on record, the trial court found that the respondent was the owner of the said open land and, therefore, declaration by way of decree was granted by the learned Trial Judge accordingly.

9. The matter was carried in appeal. The learned District Judge confirmed the judgment and decree of the trial court and dismissed the appeal of the appellant.

10. Therefore, the appellant has filed this Appeal under Section 100 of the Code of Civil Procedure (for short 'the Code') against the judgment and decree of the District Judge, Banaskantha at Palanpur.

11. It has been contended here that the Courts below have committed serious illegality in holding that the respondent was the owner of the said open land. It is also contended that the respondent had produced no evidence before the authorities below or before the two Courts below in order to prove his ownership over the suit land and, therefore, the judgment and decree of the Courts below are illegal.

12. It is further contended that the respondent had not preferred Civil Suit within one year of the decision of the Revenue Authorities and, therefore, the suit was barred by Law of Limitation.

13. On the aforesaid contention, the appellant prayed that the appeal be allowed, the judgment and decree of the Courts below be set aside and the suit of the respondent be dismissed with costs all throughout.

14. At the time of admitting the appeal, it has been observed that following substantial questions of law have been involved in the present appeal:

(i) Whether under the facts and circumstances of the case, the plaintiff has proved that he has ownership over the suit land?

(ii) Whether the decision of the Collector holding that other persons have right of passage over the land, is assailable and unauthorized ?

15. I have heard the learned Advocates for the parties and have perused the papers.

16. It is very much clear that so far as Second Appeal is concerned, it is governed by Section 100 of the Code. The provision contained in Section 100 of the Code makes it clear that an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involved substantial question of law.

17. This would clearly mean that the Second Appeal will be entertainable only on question of law and no factual aspect can be considered by this Court in this Second Appeal in view of the provisions contained in Section 100 of the Code.

18. Now it has been very vehemently contended by the learned Advocate for the appellant that the respondent had failed to prove that he was the owner in respect of the land in question. Now it has to be considered that both the Courts below have positively observed that there is a decision recorded by the Revenue Authority that respondent was the owner of the suit land. From the judgment of the District Judge it is clear that the finding has been recorded by the Revenue Authorities with respect to the ownership of the respondent in respect of the suit land. In para 8 of the judgment of the learned District Judge it was held that the suit land belongs to the respondent. It was also held that the suit land is of common use for all the persons who are residing in the vicinity.

19. Therefore, there is a clear finding of fact on record that the suit land was held to be of the ownership of the respondent by the Revenue Authority. Now this order has not been challenged by way of appeal before any of the authorities. Therefore, this finding has become final and conclusive so far as the respondent is concerned. The appellant has admittedly, not preferred

any appeal or revision against the said decision holding the respondent to be the owner of the said open land. Once the said decision has become final and conclusive, it would not be open to the appellant now to agitate before this Court that the said decision was wrong, illegal or was arrived at without any evidence on record. This Court is not sitting as a Court of appeal over the said decision of the said Revenue Authority since the said decision has not been challenged by the appellant at any point of time.

20. The respondent did not prefer Appeal against the decision holding the respondent to be the owner of the said open land. The appeals preferred by the respondent were with respect to the decision of the Revenue Authorities holding that other persons have right of passage over the suit open land.

21. This means that the Revenue Authority's decision had two considerations as under:

(i) The respondent is the owner of the suit open land,

(ii) Other persons have right of passage.

22. Out of the said two considerations, first consideration was in favour of the respondent and the respondent would naturally not prefer appeal against the said decision. The appellant has admittedly not preferred appeal against the said decision and, therefore, the said decision is final and conclusive.

23. On the other hand, so far as the right of way is concerned, the matter was carried in appeal more than once but the respondent did not succeed in those appeals and the last appeal pending before the tribunal was withdrawn by him. Therefore, this decision was against the respondent.

24. However, so far as the Revenue Authority is concerned, admittedly, it has considered other rights of easement etc. over the properties during the enquiry conducted by City Survey Officer. There, the City Survey Officer was not required to decide the rights of other persons over the suit open land. Therefore, that part of the decision was challenged in appeal and Second Appeal and that was required to be considered again by the Civil Court. The Civil Court as well as the District Court, both have considered that this part of the decision of the Revenue Authorities was not in accordance with law.

The two Courts below have held that so far as the other rights are concerned, it was not open to the Revenue Authorities to decide the rights of the neighbours of the suit open land. Therefore, the decree was passed by the trial court as well as by the lower Appellate Court in favour of the respondent.

25. The learned District Judge has observed that it is only the Panchayat who ought to have challenged the said order but unfortunately the respondent filed appeals before the Revenue Authorities.

26. However, these appeals naturally were against the said observations regarding other rights over the suit open land. The learned Advocate for the appellant has not been able to show that the Revenue authorities have right to decide rights of other persons over the suit land. So far as the ownership is concerned, the Revenue Authorities has already held that the respondent is the owner of the suit open land. So far as the other rights are concerned, it is not shown to me that the revenue authorities can decide the rights of other persons over the suit land.

27. Learned Advocate for the appellant has vehemently contended that even ownership right of the respondent has not been established over the suit. On this aspect, the provision contained in Section 101 of the Gujarat Panchayat Act has been referred at page 7 of the judgment of the learned District Judge which itself speaks as to how the claims are required to be decided.

28. It is a matter of fact that the learned Civil Judge (JD) as well as the learned District Judge both have concurrently held that the respondent is the owner of the suit land and the said decisions of these two Courts are based on the decision of the Revenue Authorities, which in turn helps the respondent to be the owner of the suit land. Therefore, this is a finding recorded by the two Courts concurrently and there is no reason to differ from the said decision recorded by the said two Courts.

29. It has also been contended by the learned Advocate for the appellant that the suit is barred by the Law of Limitation as the suit has not been filed within one year of the decision of the Revenue Authority.

30. As said above, the revenue authority can decide the ownership and not any other rights of other persons. Therefore, that part of the decision of the Revenue

Authorities could not be treated to be in accordance with law and, therefore, when the decision is against the provisions of law and when the decision is again without authority or jurisdiction, the question of limitation cannot be seriously pressed into service. In that view of the matter, the Courts below were right in holding that the suit is not barred by limitation.

31. The learned Civil Judge has also considered a decision of PARMAR GOGJI KANA v. GANESH MOTI, reported in 1968 Guj. 287. The relevant portion has been reproduced in para 8 of the judgment. It is not shown that the observation made in the said decision has not been properly followed or understood by the trial court.

32. In para 9 of the judgment, the learned District Judge has considered the case of DALLUMIYA LALMIYA MALEK v. STATE OF GUJARAT, XII GLR 668. There also it has not been shown that the learned District Judge has committed error in following the principle laid down rules in the said decision.

33. Again the learned District Judge has considered decision of 1968 Guj.287 (supra). Whether or not a particular evidence was produced before the Revenue Authorities by the respondent is not a question to be decided by this Court in this Second Appeal. There is a positive finding that the Revenue Authorities had held that the respondent was the owner of the suit land. The trial court as well as the Appellate Court have also decided the said issue accordingly in favour of the respondent.

34. In view of the aforesaid concurrent finding of fact recorded by the two Courts below, it is not open to this Court to re-appreciate evidence right from the beginning.

35. It has not been shown that the two Courts below have committed illegality in arriving at a decision that the respondent is the owner of the suit land. Same way, it has also not been shown that the two Courts below have committed error of law in holding that the suit is within limitation.

36. On both the points, the judgment and decree of the lower Appellate Court are not shown to be illegal and perverse. In that view of the matter, there is no merit in the present appeal and consequently, the appeal deserves to be dismissed.

37. This appeal is, therefore, ordered to be dismissed. The appellant shall pay cost of the respondent and shall bear their own costs.

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msp.